tense that he was misled by it. This variance, between the pleading and the proof, the court had full authority to amend or to disregard under the Code. This question of pleading has been a terror to suitors for many years before the Code. Legislatures have sought in vain to give relief, and now if this decision be sustained, I think our movement is backward much more than half a century. . . . Probably in not one case in ten thousand has injustice been done from the ignorance of a suitor as to the matters to be tried. But the cases of loss and damage to suitors by some defect of pleading have been innumerable."

The whole tendency in modern times is away from the technical view of the New York court; and the view of Peckham, J., is becoming more and more widely accepted.[8] It cannot be said that the modern view has actually resulted in the surprise or confusion so dreaded by the court in *Jackson* v. *Strong;* and certainly, as Peckham, J., observed, it is the technical view rather than the modern view which results in injustice. The New York decisions emphasize the necessity of bringing about those changes in procedural law which are now being so strongly urged by the practical and intelligent members of the bar of that state.

INCOME TAX ON NONRESIDENTS. — All taxation is based upon protection furnished by the sovereign levying the tax to person, property or business.[1] The income tax, like all other taxes, must be supported upon this principle, and it has therefore been held that income received by a nonresident from property situated beyond the state is not within the taxing power of the state.[2] So where a Wisconsin decedent left personal property to a nonresident trustee in trust for a nonresident, and the trustee removed the property from the state, it was held that income thereafter accruing was not taxable in Wisconsin.[3]

The right to tax the domiciled resident upon all his income, from whatever source, seems to be clear, since the sovereign is exercising thereby his jurisdiction over the person taxed. Most jurisdictions impose the tax upon all domiciled residents.[4] What effect the decision of the Supreme Court in *Union Refrigerator Transit Co.* v. *Kentucky*[5] may have upon the American acts is not altogether clear. The courts will probably allow the taxation of all income, even that derived from chattels situated elsewhere, at the state of the domicile, on the ground that the permission and protection of that state enables the owner to receive and enjoy the income; just as they allow the state of domicile of a decedent to tax the inheritance of chattels situated in other states.[6]

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[8] See Knapp *v.* Walker, 73 Conn. 459, 47 Atl. 655 (1900); Bruheim *v.* Stratton, 145 Wis. 271, 129 N. W. 1092 (1911); Cockrell *v.* Henderson, 81 Kan. 335, 105 P. 443 (1909); 50 L. R. A. (N. S.) 1. See also 24 HARV. L. REV. 480.

[1] Union Refrigerator Transit Co. *v.* Kentucky, 199 U. S. 194, 26 Sup. Ct. Rep. 36 (1905).

[2] State *v.* Wisconsin Tax Commission, 161 Wis. 111, 152 N. W. 848 (1915).

[3] Bayfield County *v.* Pishon, 162 Wis. 466, 156 N. W. 463 (1916).

[4] British Tax Act of 1853, § 2, Sched. C. D.; U. S. Tax Act of October 3, 1917, § 1; Wisconsin Income Tax Act, § 1087 *m*, § 2.

[5] 199 U. S. 194, 26 Sup. Ct. Rep. 36 (1905).

[6] Bullen *v.* Wisconsin, 240 U. S. 625 (1916).

The imposition of a tax upon incomes derived from property situated or from business carried on within the state seems hardly open to question. Whether we regard the tax as an excise duty, or as a property tax, it is equally true that the state which protects the property and business and permits the owner to enjoy it is entitled to tax the income arising from it. In a recent case, *Shaffer* v. *Howard*,[7] a tax was levied in Oklahoma upon the income from an oil well there situated, and operated under lease by a resident of Illinois. The proceeds of the sale of oil were actually received by the owner in Illinois. The majority of the court (Stone, Circuit Judge, and Cotteral, District Judge) held that the last fact made no difference, and that the tax was valid. Campbell, District Judge, dissented, upon the ground that in taxing the income of all residents, from whatever source, as the act did, the state was creating a tax based upon personal jurisdiction, and it was not permissible in the same act to impose a tax upon income derived by a nonresident from property in the state, which must be supported upon the ground of jurisdiction over the property. The ground of dissent seems unsound; if a tax is valid on any ground, it cannot be invalidated by classifying it as a particular kind of tax, and then alleging its invalidity because it is so classified.[8] The decision of the majority, affirming the power of the state to tax income derived from property within its territory, no matter where the income may chance to be received by the owner, seems unassailable.

WHAT CONSTITUTES A PUBLIC USE. — From the time of Magna Charta, the property of A could not be taken and given to B. A's property could only be taken for a public purpose, and then only after compensation. But when A in the use of his property had "affected it with a public interest, it ceased to be *juris privati* only,"[1] and it was because in the voluntary use of his property he had so affected it with a public interest that his use of it was subjected to public control. This was the common law whence come the rights our Constitution protects. Legislation cannot change it,[2] property cannot become affected with a public interest by mere legislative fiat. It is the voluntary use of one's property in such a manner as to make it of public consequence that gives the public the right to control its use.[3]

Looking again at the common law, certain businesses and professions were as early as the thirteenth century subject to regulation.[4] From the nature of things practically every business and every profession was

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[7] 250 Fed. 873 (Okla.) (1918).

[8] Holmes, J., in New York Central R. R. Co. *v.* Miller, 202 U. S. 584, 596 (1906).

[1] 1 HARG. LAW TRACTS, 78.

[2] State *ex rel.* M. O. Danciger & Co. *v.* The Public Service Commission, 205 S. W. 36 (Mo.) (1918); Associated Pipe Line Co. *v.* The Railroad Commission, 169 Pac. 62 (Cal.) (1917); Munn *v.* Illinois, 94 U. S. 113 (1876). See Producers' Transportation Co. *v.* The Railroad Commission, 169 Pac. 59, 61 (Cal.) (1917): "It is not the *ipse dixit* of the law, but the fact that the petitioner has voluntarily devoted its property to a public use, which justifies the control assumed by the Railroad Commission."

[3] Producers' Transportation Co. *v.* The Railroad Commission, *supra;* 1 WYMAN, PUBLIC SERVICE CORPORATIONS, § 200.

[4] 1 WYMAN, §§ 1–15; 17 HARV. L. REV. 156.